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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

PETER WILSON, On behalf of himself
and all others similarly situated,

Plaintiff,

v.

GATEWAY, INC., a California
corporation; NATIONAL
ELECTRONICS WARRANTY
CORPORATION, a Delaware
corporation,

Defendants.

GATEWAY, INC.,

Third Party Plaintiff,

v.

Case No. CV-09-07560 GW (VBKx)

Hon. George H. Wu

**PLAINTIFF'S NOTICE OF
MOTION AND UNOPPOSED
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT AND FOR
CONDITIONAL CLASS
CERTIFICATION; DECLARATION
OF ROBYN C. CROWTHER AND
EXHIBITS THERETO**

Date: June 9, 2014
Time: 8:30 a.m.
Courtroom: 10

1 NATIONAL ELECTRONICS
2 WARRANTY CORPORATION, a
3 Delaware corporation; CHARTIS
4 WARRANTY SERVICES, INC.
5 (F.K.A. AIG Warranty Services and
6 Insurance Agency, Inc.) a Delaware
7 corporation; and CHARTIS
8 WARRANTYGUARD, INC. (F.K.A.
9 AIG Warranty Guard, Inc.), a Delaware
10 corporation,

Third Party Defendants.

TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on June 9, 2014, at 8:30 a.m., or as soon thereafter as this matter may be heard, in Courtroom 10 of the above-entitled Court, located in the United States Courthouse, 312 N. Spring Street, Los Angeles, CA 90012, Plaintiff Peter Wilson will and hereby does move this Court for an order granting preliminary approval of a class-wide settlement reached in the above-captioned action, as well as for conditional certification of the Class defined in the Stipulation of Settlement and Release (the "Settlement Agreement").

This Motion is made pursuant to Fed. R. Civ. P. 23 and is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Robyn C. Crowther and exhibits thereto filed concurrently herewith, all of the pleadings and other documents on file in this case, all other matters of which the Court may take judicial notice, and any further argument or evidence that may be received by the Court at the hearing.

The required meet and confer pursuant to Local Rule 7-3 took place throughout the settlement negotiations, and, in particular, the filing of this Motion is contemplated by the Parties' Settlement Agreement, which states that Defendants will not oppose the Motion. (Declaration of Robyn C. Crowther ("Crowther Decl."), ¶ 19.)

DATED: May 12, 2014

Respectfully submitted,

CALDWELL LESLIE & PROCTOR, PC
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By /S/ Robyn C. Crowther

ROBYN C. CROWTHER

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

After more than four and a half years of litigation, Plaintiff Peter Wilson¹ and Defendants Gateway, Inc. (“Gateway”) and National Electronics Warranty Corp. (“NEW”) (collectively, “Defendants”) have accepted a mediator’s proposal and reached an agreement to settle this consumer class-action pursuant to the terms set forth in the accompanying Stipulation of Settlement and Release (the “Settlement Agreement”). The Settlement Agreement is the product of a complex and hard-fought litigation, followed by an appeal and nearly a year of arm’s-length settlement negotiations, including formal mediation under the auspices of a private mediator, the Honorable Patricia L. Collins (ret.) To facilitate the settlement, Wilson seeks preliminary approval of the Settlement Agreement and conditional certification of a settlement class.

In this action, Wilson is the class representative for a putative class of consumers who allegedly did not receive the benefits of the approximately 1.7 million extended computer warranties they purchased from Defendants. The proposed Settlement Agreement provides injunctive relief for the entire class of similarly situated consumers, securing for them the complete benefit of the computer warranties they purchased, in exchange for the dismissal of all claims asserted in this action.

Federal Rule of Civil Procedure 23(e) requires judicial approval for the compromise of claims brought on a class-wide basis. Approval under Rule 23(e) involves a two-step process: first, entry of a “preliminary approval” order; and second, after a hearing has been held to consider the fairness, reasonableness and adequacy of the proposed settlement, entry of a “final approval” order or judgment. *See Manual for Complex Litigation*, § 13.14 (4th ed. 2004). In this initial stage of

¹ During the course of this action, Peter Wilson changed his name to Peter Schweitzer due to marriage. For ease of reference, we use his former name herein.

1 the approval process, the Court need only determine that the proposed settlement is
2 within the range of reasonableness.

3 Here, the injunctive relief afforded in the Settlement Agreement provides real
4 benefits to the class. As a result of this settlement, the class will receive a year of
5 warranty service, the retail value of which is approximately \$60.00 per consumer.
6 The class-wide recovery is particularly significant because the settlement was
7 reached during the pendency of an appeal from this Court's November 10, 2011
8 order dismissing the class claims and ordering Wilson to arbitrate his individual
9 claims in light of the Supreme Court's decision in *AT&T Mobility v. Concepcion*, --
10 U.S. --, 131 S. Ct. 740 (2011). Thus, Wilson secured injunctive relief with concrete
11 benefits for a class of more than a million consumers who faced a real possibility of
12 obtaining no relief whatsoever. Wilson therefore requests that the Court
13 conditionally certify the class and preliminarily approve the class-wide Settlement
14 Agreement.

15 **II. PLAINTIFF'S SUMMARY OF CLAIMS AND PROCEDURAL** 16 **HISTORY**

17 The facts recited herein are Plaintiff's allegations and are not conceded or
18 agreed to by Defendants.

19 **A. *NEW and Gateway Sell 1.7 Million Professional Extended Service*** 20 ***Plan Warranties***

21 Since 2005, class members purchased approximately 1.7 million extended
22 service plans from the Professional Business Line of Gateway. (Third Amended
23 Complaint ("TAC"), Ex. C, ¶ 3.) The computer warranties were sold by Gateway,
24 partially administered by NEW, and underwritten by third-party defendant Chartis
25 Warranty Services, Inc. ("Chartis"). Among other terms, the warranties contained an
26 arbitration clause that included a class action waiver. (Docket No. ("Dkt. No.") 188
27 at p. 66 (¶ 5).)
28

1 ***B. Wilson's Warranty Purchase in 2005***

2 On July 20, 2005, as part of his preparations to enroll in his first year of
3 college, Wilson purchased a package comprised of a new Gateway computer and
4 four warranties. (Ex. C, ¶¶ 84, 86, 87.) One of the warranties was a Limited
5 Warranty, valid for only ninety days from the date of purchase, that came with every
6 Gateway computer. The other three warranties were four-year extended service
7 plans, which Wilson bought for additional protection. (The three four-year extended
8 service plans (which were packaged together with the 90-day Limited Warranty in a
9 single booklet) are referred to herein as the "Pro-ESPs.")

10 ***C. Wilson's Allegations of Defendants' Refusal to Service the Warranties***

11 On August 27, 2007, Gateway announced that it was being acquired by Acer,
12 Inc., the Taiwan-based technology giant. (Ex. C, ¶ 41.) Acer's \$710 million
13 acquisition did not include Gateway's Professional Business division (the Gateway
14 division that sold the laptop and warranties to Wilson). (*Id.*, ¶¶ 20-21.) In October
15 2007, Gateway sold its Professional Business division to MPC Corporation
16 ("MPC"). (*Id.*, ¶ 42.) MPC would later service the approximately 1.7 million
17 extended warranties. (*Id.*) Wilson contends that the terms of the sale confirm that
18 Gateway knew, or should have known, about MPC's bleak financial situation. (*Id.*,
19 ¶ 43.) In November 2008, MPC filed a voluntary petition for Chapter 11
20 bankruptcy. (*Id.*, ¶¶ 51-55.) Within one or two months of its bankruptcy filing,
21 MPC stopped servicing all of the extended warranties, permanently. (*Id.*, ¶¶ 54-55.)

22 **1. Gateway Refers Wilson to the Bankrupt MPC**

23 In late 2008 or early 2009, Wilson's laptop stopped working. (Ex. C, ¶ 115.)
24 As Gateway's own website directed, Wilson contacted Gateway by telephone for
25 service. (*Id.*, ¶ 116.) A Gateway representative informed Wilson that, due to
26 Gateway's recent sale of its Professional Business division to MPC, all service and
27 support for Wilson's warranty was now being handled by MPC. (*Id.*, ¶ 117.)

1 Wilson then contacted MPC, which informed him that it had ceased operations in
2 December 2008 due to its bankruptcy. (*Id.*, ¶ 118.)

3 Wilson contacted Gateway for a second time to complain that he was entitled
4 to have his extended warranty honored by Gateway. (*Id.*) A Gateway
5 representative again referred Wilson to MPC. (*Id.*) Wilson then filed a Better
6 Business Bureau complaint, to which Gateway responded by stating: “We do
7 understand the frustration that Mr. Wilson may be experiencing; however, Gateway
8 is no longer responsible for this account.” (*Id.*).

9 **2. Defendants Treated All Class Members Identically**

10 Wilson was not alone. Approximately 1.7 million extended warranties were
11 active as of October 1, 2007, when Gateway sold its Professional Business division
12 to MPC. (Ex. C, ¶¶ 1, 8.) Wilson contends that, after that date, Defendants treated
13 every extended warranty holder—i.e., every putative class member—exactly the
14 same. (*Id.*, ¶¶ 72-83.)

15 Starting in late 2007, Gateway directed all warranty holders who called
16 Gateway’s support hotline to MPC. (*Id.*, ¶¶ 72-81.) Wilson contends that similar
17 service refusals were provided when consumers emailed Gateway or visited its
18 technical support website. (*Id.*, ¶ 75.) Because the warranties instructed consumers
19 to call Gateway at 1-877-485-1464 to obtain service (the same number that Wilson
20 used to contact Gateway), Gateway transferred that number to MPC. (*Id.*, ¶ 76.)

21 Rather than providing consumers with service, or directing them to NEW or
22 Chartis, Gateway informed consumers that they must contact MPC to obtain a
23 remedy. (Dkt. No. 288, Schweitzer Decl., ¶¶ 11 & 15; Ex. C, ¶¶ 119-20.)

24 **D. Plaintiff’s Initiation of the Action**

25 On October 16, 2009, Wilson filed suit on behalf of a nationwide class of all
26 persons who purchased an extended warranty from Gateway and whose warranty
27 service obligations were later transferred by Gateway to MPC in October 2007.
28 (Dkt. No. 1, ¶ 55.) In his First Amended Complaint, filed on February 24, 2010,

1 Wilson brought claims for breach of contract and unjust enrichment against
 2 Gateway. (Dkt. No. 179.) On March 24, 2010, Gateway filed its Answer and
 3 asserted arbitration as its twenty-eighth affirmative defense. (Dkt. No. 20 at p. 25.)
 4 That same week, Gateway alerted NEW to this litigation by forwarding Wilson's
 5 First Amended Complaint and Gateway's Answer to NEW's attorneys. (Dkt. No.
 6 288, Ex. D. to Crowther Decl.)

7 ***E. Wilson's Lawsuit Triggers a Change in Gateway's Conduct***

8 In June 2010, Gateway changed its website to instruct Pro-ESP holders how
 9 to obtain support from Chartis. (Dkt. No. 288, Crowther Decl., ¶¶ 10-11, 15); (Dkt.
 10 No. 288, Ex. I to Crowther Decl.; Ex. C, ¶¶ 125-27.) Sometime thereafter, NEW
 11 reactivated the toll-free Pro-ESP support line. (Ex. C, ¶ 127.) The changes were a
 12 direct result of this action and exemplify how Wilson *has already* ensured that
 13 similarly situated consumers would receive the benefits of their Pro-ESP warranties.
 14 (*Id.*, ¶ 128.)

15 ***F. Procedural History Leading Up to the Mediation***

16 Pursuant to the Court's scheduling orders regarding bifurcated discovery, the
 17 Parties were to complete all class-related discovery by October 30, 2010. (Court
 18 Docket at p. 12 [Docket No. 39].) Accordingly, between May and October, 2010,
 19 Gateway and Wilson served each other with the full panoply of class-related
 20 discovery, including document requests, interrogatories, requests for admission, and
 21 deposition notices. (Dkt. No. 177 at pp. 10-11; Dkt. No. 177-1, ¶ 3; Dkt. No. 177-3
 22 – 177-7.) Between July and November 2010, Gateway produced twenty massive
 23 consumer databases and an additional 100,329 class-related documents to Wilson,
 24 comprising 28 Gigabytes of data. (Dkt. No. 300 at p. 25; Dkt. No. 63, Crowther
 25 Decl., ¶ 2.) On December 15, 2010, Gateway produced an additional 93,306 class-
 26 related documents to Wilson, bringing its total production close to 200,000
 27 documents. (Dkt. No. 297 at p. 25; Dkt. No. 297-1, ¶ 6; Dkt. No. 288, ¶ 16.)

28

1 On September 14, 2010, Gateway filed a Third Party Complaint with claims
 2 for contractual indemnity and contribution against NEW and Chartis, alleging that
 3 NEW and Chartis were liable to class members because NEW was the entity
 4 responsible for servicing the extended warranties. (Dkt. No. 179 at pp. 12-14; Dkt.
 5 No. 288 at p. 4.)

6 On September 29, 2010, Wilson notified NEW that he would sue NEW for its
 7 role in Gateway's alleged failure to honor the warranties. (Dkt. No. 233, ¶ 5; Ex. C,
 8 Ex. D at p. 1.). Wilson filed a motion for leave to amend the First Amended
 9 Complaint on October 12, 2010. (Dkt. No. 288 at p. 4-5.) In the Second Amended
 10 Complaint ("SAC"), Wilson added claims under California's Unfair Competition
 11 Law ("UCL") and Consumer Legal Remedies Act ("CLRA") against both Gateway
 12 and NEW, and added NEW to the unjust enrichment claim. (Dkt. No. 321 at p. 1;
 13 Dkt. No. 179 at p. 2; Dkt. No. 288 at p. 4-6.)

14 On February 7, 2011, Wilson filed his Third Amended Complaint. (Ex. C.)
 15 The 57-page TAC included the same claims and parties as the SAC, but set forth
 16 Wilson's allegations in more detail. (*Id.*)

17 On February 10, 2011, the Court denied Gateway's initial motion to compel
 18 arbitration, (Dkt. No. 186 at pp. 1-3), ruling that:

19 Gateway has waived its right to compel arbitration by
 20 vigorously litigating this case virtually from its inception,
 21 and by failing to compel arbitration or seek a stay in May
 22 2010, when certiorari was granted in Concepcion.

23 (Dkt. No. 186 at p. 2.) The denial was without prejudice, due to the Supreme
 24 Court's forthcoming opinion in *Concepcion*. (*Id.* at p. 1; Dkt. No. 358.)

25 NEW then filed its own motion to compel arbitration on February 24, 2011,
 26 as well as a motion to dismiss the TAC and a motion to strike the TAC's class
 27 allegations. (Dkt. No. 267; Dkt. Nos. 206-208.) Gateway also filed a motion to
 28 dismiss, but did not seek to dismiss Wilson's UCL claim. (Dkt. No. 267 at p. 5.)

1 The Court issued tentative written rulings on Defendants' motions and heard
 2 oral argument on April 21, 2011. (Dkt. No. 341; Dkt. No. 267 at pp. 1-3.) In the
 3 tentative rulings, the Court denied NEW's motion to strike, granted the motions to
 4 dismiss as to Wilson's contract claims, and ruled that Wilson had adequately pled
 5 both the UCL and CLRA claims, which could go forward. (Dkt. No. 267 at pp. 1-
 6 3.) However, the Court did not adopt its tentative opinions, and took the motions
 7 under submission. (Dkt. No. 267 at p. 1.)

8 Six days later, on April 27, 2011, the Supreme Court issued *AT&T Mobility v.*
 9 *Concepcion*, -- U.S. --, 131 S. Ct. 740 (2011). On May 23, 2011, Gateway filed a
 10 second motion to compel arbitration, and NEW filed a supplemental brief to its
 11 pending motion to compel. (Dkt. Nos. 277 & 279; Dkt. Nos. 275 & 276.) Extensive
 12 briefing on these motions ensued, and the Court heard five additional oral arguments
 13 on the subject. (Dkt. No. 312; Dkt. No. 308; Dkt. No. 333.) The Court finally
 14 granted each Defendant's motion to compel arbitration and dismissed the case with
 15 prejudice on November 10, 2011 (the "Arbitration Order"). (Dkt. No. 321 at pp. 1-
 16 2.) The Arbitration Order expressly incorporated the five prior oral arguments and a
 17 tentative opinion from September 22, 2011. (*Id.* at p. 2.) By enforcing the arbitration
 18 clause and class action waiver in the Pro-ESPs, the Arbitration Order left each
 19 putative class member to pursue his or her own individual claims through arbitration.

20 Wilson filed a Notice of Appeal on December 5, 2011. (Dkt. No. 324 at pp.
 21 1-4.) Briefing on the appeal was completed in July 2012 and the Ninth Circuit
 22 scheduled oral argument for May 6, 2013.

23 ***G. Mediation and the Settlement Agreement***

24 On March 13, 2013, after the Appeal was fully briefed and prior to oral
 25 argument, the Parties participated in a full-day mediation under the guidance of the
 26 Honorable Patricia L. Collins (ret.) of ADR Services, Inc. Following the mediation,
 27 there was a mediator's proposal and, after approximately a year of negotiating the
 28

1 long-form settlement agreement between all Parties, the Settlement Agreement was
2 reached. (Crowther Decl., ¶ 3.)

3 On February 28, 2014, Wilson filed an unopposed motion requesting that the
4 Ninth Circuit issue a limited remand to this Court to evaluate the proposed
5 Settlement Agreement. The Ninth Circuit granted the motion.

6 **III. SUMMARY OF THE SETTLEMENT AGREEMENT**

7 **A. The Class Definition**

8 Subject to several enumerated exceptions, the Settlement Agreement defines
9 the “Class” as “[A]ll holders of Extended Service Plans (“ESP”) purchased for
10 Gateway computers on or before December 1, 2008 that had not expired as of
11 December 1, 2008.”² (Settlement Agreement, ¶ 1.3.)

12 “A class definition should be ‘precise, objective and presently ascertainable.’”
13 *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 376 (N.D. Cal. 2010)
14 (quoting *Rodriguez v. Gates*, 2002 WL 1162675 at * 8 (C.D. Cal. 2002)). A class
15 definition is sufficient if the description of the class is “definite enough so that it is
16 administratively feasible for the Court to ascertain whether an individual is a
17 member.” *O’Connor v. Boeing N.Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998).
18 The Class definition meets this standard, as it has only two criteria: (1) a holder of a
19 Pro-ESP purchased prior to December 1, 2008 (*i.e.*, prior to MPC’s bankruptcy);
20 and (2) the ESP had not expired as of December 1, 2008. These criteria are precise
21 and objective, and members of the class are easily ascertainable from the serial
22 numbers on the consumers’ computers. (*See* Settlement Agreement, ¶ 7.2(b).)

26 ² Excepted from the Class definition are officers, directors, employees (or
27 immediate family members of the foregoing) of Defendants, including any parent,
28 subsidiary or affiliate of the Defendants, and counsel for Defendants and their
immediate family members. (Settlement Agreement, ¶ 1.3(a)-(c).)

1 ***B. The Significant Benefit to the Class***

2 Under the Settlement Agreement, every member of the Class (a “Class
3 Member”) will receive an additional year of warranty service, commencing on the
4 date of the Court’s final approval order. (Settlement Agreement, ¶ 4.2(a).) NEW is
5 required to service the warranties. (*Id.*) Moreover, NEW must establish a dedicated
6 phone number and implement appropriate protocols and training procedures for the
7 personnel who will be charged with handling service claims made by the Class.
8 (*Id.*) NEW shall pay any and all costs associated with the shipping and handling of
9 the Class Members’ equipment, and must make arrangements for the repair and/or
10 replacement of a Class Member’s equipment at no cost to the Class Member. (*Id.*)
11 NEW estimates the retail price for the twelve additional months of warranty
12 coverage for each Class Member who submits a valid claim to be \$60.00.
13 (Settlement Agreement, ¶ 7.5(b).) Given that the Court previously dismissed the
14 claims of the Class Members, the injunctive relief provides a significant benefit to
15 each member of the Class that otherwise would be nonexistent.

16 ***C. The Incentive and Fee Awards***

17 Under the Settlement Agreement, Class Counsel may request an incentive
18 award for Wilson in the amount of \$10,000.00, which Defendants will not oppose.
19 (Settlement Agreement, ¶ 4.3(a).) *See Rodriguez v. West Publishing Corp.*, 563
20 F.3d 948, 958 (9th Cir. 2009) (“Incentive awards are fairly typical in class action
21 cases.”). The incentive award, if approved by the Court, will be paid by NEW, in
22 addition to any amounts necessary to provide the Class relief. (Settlement
23 Agreement, ¶ 4.3(a).) Accordingly, the incentive award will not erode or diminish
24 the benefits to the Class in any way. (*Id.*)

25 After reaching agreement upon all other material terms of the Settlement
26 Agreement, the Parties negotiated the provisions relating to attorneys’ fees, costs
27 and expenses. (Settlement Agreement, ¶ 10.1.) Defendants agreed not to object to
28 any application for an award of attorney’s fees, costs and expenses of up to one

1 million dollars. (Settlement Agreement, ¶ 10.3.) The maximum fee award is less
 2 than 50% of the lodestar for proposed Class Counsel’s fees. (Crowther Decl., ¶ 4.)
 3 Significantly, the effectiveness of the Settlement Agreement is not conditioned upon
 4 the Court’s approval of the incentive award or the fee application. (Settlement
 5 Agreement, ¶¶ 4.3(b), 10.7.)

6 **IV. THE COURT SHOULD CERTIFY THE CLASS AND** 7 **PRELIMINARILY APPROVE THE SETTLEMENT**

8 **A. Standards for Preliminary Approval of the Settlement**

9 The Ninth Circuit has declared that a “strong judicial policy” favors
 10 settlement of class actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276
 11 (9th Cir. 1992); *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008)
 12 (“[T]here is a strong judicial policy that favors settlements, particularly where
 13 complex class action litigation is concerned.”). Indeed, class action settlement
 14 agreements should be deemed presumptively valid. *See Petrovic v. AMOCO Oil*
 15 *Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999) (“[a] strong public policy favors
 16 [settlement] agreements, and courts should approach them with a presumption in
 17 their favor”) (citations and quotations omitted).

18 Where, as here, “parties reach a settlement agreement prior to class
 19 certification, courts must peruse the proposed compromise to ratify both the
 20 propriety of the certification and the fairness of the settlement.” *Staton v. Boeing*
 21 *Co.*, 327 F.3d 938, 952 (9th Cir. 2003). There are thus two parts to the Court’s
 22 inquiry. “First, the district court must assess whether a class exists.” *Id.*; *Amchem*
 23 *Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (“Such attention is of vital
 24 importance, for a court asked to certify a settlement class will lack the opportunity,
 25 present when a case is litigated, to adjust the class, informed by the proceedings as
 26 they unfold.”). “Second, the district court must carefully consider ‘whether a
 27 proposed settlement is fundamentally fair, adequate, and reasonable,’ recognizing
 28 that ‘[i]t is the settlement taken as a whole, rather than the individual component

1 parts, that must be examined for overall fairness’.” *Staton*, 327 F.3d at 952 (quoting
 2 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)) (citations omitted).
 3 However, at the stage of preliminary approval, the Court must determine only if the
 4 settlement falls within the “range of possible judicial approval.” *Monterrubio v.*
 5 *Best Buy Stores, L.P.*, 291 F.R.D. 443, 448 (E.D. Cal. 2013).

6 Here, the two-part inquiry dictates that the Court should (1) conditionally
 7 certify the class; and (2) preliminarily approve the Settlement Agreement.

8 ***B. Class Certification Is Warranted***

9 The Ninth Circuit has long recognized that class actions may be certified for
 10 the purpose of settlement only. *See Hanlon*, 150 F.3d at 1019 (discussing “proposed
 11 settlement class”); *see also Amchem Prods. Inc.*, 521 U.S. at 620 (discussing
 12 approval of settlement class). The Court has wide discretion in certifying a class for
 13 settlement purposes and will be reversed “only upon a strong showing that [its]
 14 decision was a clear abuse of discretion.” *Dunleavy v. Nadler*, 213 F.3d 454, 461
 15 (9th Cir. 2000) (quoting *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1238 (9th
 16 Cir. 1998)).

17 Rule 23(a) sets forth the four prerequisites to class certification: (1) the class
 18 must be so numerous “that joinder of all members is impracticable,” (2) there must
 19 be “questions of law or fact common to the class,” (3) the claims of the
 20 representative plaintiff must be “typical of the claims . . . of the class,” and (4) the
 21 class representative must show that he “will fairly and adequately protect the
 22 interests of the class.” Fed. R. Civ. P. 23(a). These requirements are commonly
 23 referred to as “numerosity,” “commonality,” “typicality,” and “adequacy of
 24 representation.” *Hanlon*, 150 F.3d at 1019.

25 In addition to satisfying the certification criteria of Rule 23(a), one of the four
 26 non-exclusive factors in Rule 23(b) must be satisfied. Rule 23(b)(2) authorizes class
 27 certification where injunctive relief is sought, that is, where the Defendants have
 28 “acted or refused to act on grounds that apply generally to the class, so that final

1 injunctive relief or corresponding declaratory relief is appropriate respecting the
2 class as a whole.” Fed. R. Civ. P. 23(b)(2).

3 Under these standards, for settlement purposes, the Court should conditionally
4 certify a class for injunctive relief consisting of: “[A]ll holders of Extended Service
5 Plans (“ESP”) purchased for Gateway computers on or before December 1, 2008
6 that had not expired as of December 1, 2008.” (Settlement Agreement, ¶ 1.3.)

7 **1. The Proposed Class Satisfies the Numerosity Requirement of**
8 **Rule 23(a)(1)**

9 Rule 23(a)(1) requires that the class be so numerous that joinder of all class
10 members is “impracticable.” Fed. R. Civ. P. 23(a)(1). Impracticable does not mean
11 impossible, only that it would be difficult or inconvenient to join all members of the
12 class. *See Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th
13 Cir. 1964). Classes consisting of only 25 members have been held to be large
14 enough to justify certification. *See Perez-Funez v. Dist. Director, INS*, 611 F. Supp.
15 990, 995 (C.D. Cal. 1984). Indeed, Courts generally presume numerosity for
16 proposed classes that include 40 or more members. *See Consolidated Rail Corp. v.*
17 *Town of Hyde Park*, 47 F.3d 473, 483 (2nd Cir. 1995); *Celano v. Marriott Intern,*
18 *Inc.*, 242 F.R.D. 544, 548-49 (N.D. Cal. 2007) (generally the requirement is satisfied
19 when the class comprises 40 or more members).

20 Here, the Class is at the other end of the spectrum, consisting of up to 1.7
21 million consumers who purchased warranties that were unexpired on December 1,
22 2008. *See In re Abbott Laboratories Norvir Anti-Trust Litigation*, C 04-1511 CW,
23 2007 WL 1689899 *6 (N.D. Cal. 2007) (“Where ‘the exact size of the class is
24 unknown, but general knowledge and common sense indicate that it is large, the
25 numerosity requirement is satisfied.’”) (quoting 1 Alba Cone & Herbert B.
26 Newberg, *Newberg on Class Actions* § 3.3 (4th ed. 2002)). This number easily
27 satisfies the numerosity requirement because joinder of such a large number of
28 individuals would be impracticable.

1 **2. The Proposed Class Satisfies the Commonality Requirement**
 2 **of Rule 23(a)(2)**

3 In addition, questions of fact and law are common to the proposed Class, as
 4 Rule 23(a)(2) mandates. *See In re Paxil Litig.*, 212 F.R.D. 539, 549 (C.D. Cal.
 5 2003) (“[T]he commonality requirement is interpreted to require very little.”). The
 6 question of commonality focuses on the relationship of facts and legal issues among
 7 class members. *Chavez*, 268 F.R.D. at 377. “It is sufficient if class members
 8 complain of a pattern or practice that is generally applicable to the class as a whole.”
 9 *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998). The question is one of
 10 “common sense”; where “the class is united by a common interest in determining
 11 whether a defendant’s course of conduct is in its broad outlines actionable,”
 12 commonality is not defeated “by slight differences in class members’ positions.”
 13 *Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir. 1975). The commonality
 14 requirement may be satisfied if the claims of the prospective class have even one
 15 significant issue common to the class. *See, e.g., Hanlon*, 150 F.3d at 1019-20;
 16 *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1356 (11th Cir. 2009) (finding that
 17 Rule 23(a)(2)’s “common question” requirement creates only a “low hurdle” to class
 18 certification).

19 The legal questions that Wilson asserts are common to each member of the
 20 Class include, but are not limited to, the following:

- 21 • whether Gateway violated contractual warranties and obligations;
- 22 • whether Defendants made representations and assertions that violated the
- 23 Consumer’s Legal Remedies Act; and
- 24 • whether Defendants engaged in unfair, unlawful, and deceptive trade
- 25 practices in violation of the Unfair Competition Law.

26 (Ex. C, ¶ 131(b).)

1 Significantly, Wilson contends that Defendants treated all members of the
2 Class identically and that there is no real question that common questions of fact and
3 law predominate.

4 **3. The Proposed Class Satisfies the Typicality Requirement of**
5 **Rule 23(a)(3)**

6 The typicality requirement of Rule 23(a)(3) is satisfied when the claims or
7 defenses of the party representing the class are typical of the claims or defenses of
8 the other class members. *See Amchem Prods.*, 521 U.S. at 625-26. The purpose of
9 the typicality requirement is to ensure that the class representative will be motivated
10 to protect the interests of the class. *See Hanon v. Dataproducts Corp.*, 976 F.2d
11 497, 508 (9th Cir. 1992). “Some degree of individuality is to be expected in all
12 cases, but that specificity does not necessarily defeat typicality.” *Hanlon*, 150 F.3d
13 at 1020; *see also Staton*, 327 F.3d at 957 (“[T]ypicality does not mean that the
14 claims of the class representative[s] must be identical or substantially identical to
15 those of the absent class members.” (internal citations omitted)).

16 Wilson’s claims are typical of the Class that he seeks to represent: each class
17 member purchased a Pro-ESP warranty that was unexpired as of December 1, 2008
18 and allegedly did not receive the full benefit of his or her Pro-ESP.³ (*See* Ex. C,
19 ¶¶ 135, 150, 158 & 166.) As a result of this litigation, Pro-ESP holders are no

20 _____
21 ³ Wilson’s claims regarding Defendants’ deceptive practices are made pursuant to
22 the UCL and CLRA, not common law fraud. “[R]elief under the UCL is available
23 without individualized proof of decision, reliance and injury,” and Wilson must
24 show only that “members of the public are likely to be deceived.” *In re Tobacco II*
25 *Cases*, 46 Cal.4th 298, 320 (2009). Indeed, where, as here, a “centrally-orchestrated
26 scheme to mislead” is alleged, it is the scheme and not the precise details of any
27 individual’s experience that forms the nucleus of the class claims. *In re First*
28 *Alliance Mortgage Co.*, 471 F.3d 977, 991 (9th Cir. 2006); *Schaefer v. Overland*
Express Family of Funds, 169 F.R.D. 124, 128-29 (S.D. Cal. 1996) (cases
challenging the same unlawful conduct which affects both the named plaintiffs and
the putative class usually satisfy the typicality requirement irrespective of the
varying fact patterns underlying the individual claims).

1 longer directed to MPC. Wilson's claims are thus the same (not just typical) as
2 those of the other Class Members.

3 **4. The Proposed Class Satisfies the Adequacy Requirement of**
4 **Rule 23(a)(4)**

5 The final requirement of Rule 23 provides that the class representative "fairly
6 and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The
7 Ninth Circuit has established a two-prong test for this requirement: "(1) Do the
8 representative plaintiffs and their counsel have any conflicts of interest with other
9 class members, and (2) will the representative plaintiffs and their counsel prosecute
10 the action vigorously on behalf of the class?" *Staton*, 327 F.3d at 957. Wilson
11 meets both standards.

12 First, Wilson's interests are aligned with those of the other members of the
13 Class. All allege the same problem: they were denied the value of the Pro-ESPs
14 they purchased from Defendants. *See Hanlon*, 150 F.3d at 1021 ("each potential
15 plaintiff has the same problem"). Wilson, like all other Class members who
16 contacted Gateway for warranty service during the relevant time period, was
17 repeatedly misdirected by Gateway to MPC. (Ex. C, ¶¶ 74, 117.) Wilson's interests
18 are thus not antagonistic to the proposed Class; rather, his interests are aligned
19 directly with those of the Class.

20 Second, Wilson has represented the class fairly and sought the best for them.
21 (*See* Section II. C, *supra*) Wilson has been motivated to seek justice for the
22 allegedly improper denial of warranty service since Gateway deflected his inquiries
23 in early 2009. (*Id.*) Wilson initiated a formal complaint with the Better Business
24 Bureau and was upset by Gateway's utter failure to ensure that his computer was
25 serviced. (*Id.*) Wilson initiated this action after he learned that there were other
26 people who had purchased Pro-ESP warranties and been denied service. (*Id.*)
27 Indeed, Wilson has already obtained significant benefits for the Class: In June 2010
28 Gateway finally changed its website—as a result of this litigation—to instruct Pro-

1 ESP holders how to obtain support from Chartis, and sometime thereafter NEW
2 reactivated the toll-free Pro-ESP support line. (*See* Section II.E, *supra*.)

3 In addition, the two law firms serving as proposed class counsel are well-
4 suited to represent the interests of the proposed Class. *See* Fed. R. Civ. P. 23(g)(1).
5 Wilson has engaged experienced, competent legal counsel to represent the Class.
6 (Crowther Decl. ¶¶ 6 & 10, Exs. A & B.) Counsel have considerable experience
7 with complex consumer class actions and have no conflicts that would prevent them
8 from adequately representing the interests of the Class. (Crowther Decl., ¶¶ 7-11.)

9 **5. The Requirements for Certification of an Injunctive Class**
10 **Under Rule 23(b)(2) Are Met**

11 The Rule 23(b)(2) Class should be certified because each “party opposing the
12 class has acted or refused to act on grounds that apply generally to the class, so that
13 final injunctive relief or corresponding declaratory relief is appropriate respecting
14 the class as a whole.” Fed. R. Civ. P. 23(b)(2); *Wal-Mart Stores, Inc. v. Dukes*, 131
15 S.Ct. 2541, 2557 (2011) (“Rule 23(b)(2) applies . . . when a single injunction or
16 declaratory judgment would provide relief to each member of the class.”).

17 Here, the first requirement of Rule 23(b)(2), that defendants “acted or refused
18 to act on grounds that apply generally to the class,” is easily met as explained in
19 Section II.C, *supra*. Indeed, Wilson seeks injunctive relief to remedy the Class’s
20 inability to obtain servicing under their Pro-ESPs. The second requirement of Rule
21 23(b)(2), “that final injunctive relief or corresponding declaratory relief is
22 appropriate respecting the class as a whole,” also is met. Each Class Member was
23 similarly unable to obtain the benefits of their Pro-ESP warranties. Plaintiff’s
24 claims do not “entitle named or unnamed class members to any form of
25 individualized injunctive relief.” *Grant v. Capital Management Services, L.P.*, 10-
26 CV-2471-WQH BGS, 2013 WL 6499698, *4 (S.D. Cal., Dec. 11, 2013). Rather,
27 the equitable relief provided for in the Settlement Agreement provides the same
28

1 relief for the entire Class: an additional 12-months of warranty service.

2 Accordingly, the Class is appropriate for certification under Rule 23(b)(2).

3 ***C. The Settlement Meets the Requirements for Preliminary Approval***

4 Under Rule 23(e) of the Federal Rules of Civil Procedure, a class-action
 5 settlement should be approved if it is “fair, reasonable, and adequate.” Fed. R. Civ.
 6 P. 23(e)(2); *Officers for Justice v. Civil Service Comm’n of the City and County of*
 7 *San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) (“the universally applied standard
 8 is whether the settlement is fundamentally fair, adequate and reasonable”). “At this
 9 first step of preliminary approval, the Court must conduct a *prima facie* review of
 10 the relief and notice provided by the [Settlement Agreement], before the Court
 11 orders notice sent to the tentative Settlement Class Members.” *Browning v. Yahoo!*
 12 *Inc.*, No. C04-01463, 2006 WL 3826714, at *4 (N.D. Cal. Dec. 27, 2006) (citing
 13 David F. Herr, *Annotated Manual For Complex Litigation* § 21.632 (4th ed. 2005)).
 14 “The initial decision to approve or reject a settlement proposal is committed to the
 15 sound discretion of the trial judge.” *Officers for Justice*, 688 F.2d at 625.

16 In conducting this analysis, the Court may look to the factors which it will
 17 eventually consider in granting final approval of the settlement. *See West v. Circle*
 18 *K Stores, Inc.*, CIV. S-04-0438, 2006 WL 1652598, at *9 (E.D. Cal. June 13, 2006).
 19 In the Ninth Circuit, district courts balance several factors in determining whether to
 20 grant final approval: (1) the strength of the plaintiff’s case, (2) the risk, expense,
 21 complexity, and likely duration of further litigation, (3) the risk of maintaining class
 22 action status throughout the trial, (4) the amount offered in settlement, (5) the extent
 23 of discovery completed and the stage of the proceedings, (6) the experience and
 24 views of counsel, (7) the presence of a governmental participant, and (8) the
 25 reaction of the proposed class members to the proposed settlement. *Id.* (quoting
 26 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). “Given that some
 27 of these factors cannot be fully assessed until the court conducts its fairness hearing,
 28

1 ‘a full fairness analysis is unnecessary at this stage.’”⁴ *Id.* (quoting *Reade-Alvarez*
 2 *v. Eltman, Eltman & Cooper, PC*, 2006 WL 1367414, at *7 (E.D.N.Y. May 18,
 3 2006)). Indeed, “[t]he court is really only concerned with ‘whether the proposed
 4 settlement discloses grounds to doubt its fairness or other obvious deficiencies such
 5 as unduly preferential treatment of class representatives or segments of the class, or
 6 excessive compensation of attorneys.’” *Id.* at *11 (quoting *Tenuto v. Transworld*
 7 *Sys., Inc.*, 2001 WL 1347235, at *1 (E.D. Pa. Oct. 31, 2001)).

8 **1. The Settlement Agreement Should Be Presumed to Be Fair**

9 “As an initial matter, the fact that the settlement agreement was reached in
 10 arm’s length negotiations after relevant discovery [has] taken place create[s] a
 11 presumption that the agreement is fair.” *In re Immune Response Securities*
 12 *Litigation*, 497 F. Supp. 2d 1166, 1171 (S.D. Cal. 2007) (quotations omitted)
 13 (alterations in original). Here, the Settlement Agreement is the product of extensive
 14 arm’s-length negotiations conducted by experienced counsel and after significant
 15 discovery. (Crowther Decl., ¶¶ 3, 13.) Indeed, prior to the Arbitration Order, the
 16 Parties had exchanged more than 200,000 documents and engaged in lengthy motion
 17 practice. (*See* Section II.F, *supra*.) Then, during the pendency of the appeal from
 18 the Arbitration Order, the Parties voluntarily engaged in mediation before the
 19 Honorable Patricia L. Collins (ret.) of ADR Services, Inc. Following the mediation,
 20 there was a mediator’s proposal and approximately a year of negotiations that led to
 21 the Settlement Agreement. These arm’s-length negotiations that followed
 22 significant discovery “are highly indicative of fairness.” *In re Immune Response*
 23 *Securities Litigation*, 497 F. Supp. 2d at 1171. Accordingly, the fairness, adequacy,
 24 and reasonableness of the Settlement Agreement may be presumed.

25
 26
 27 ⁴ Because there is no governmental participant and the reaction of class members
 28 cannot be gauged until the final approval hearing, these two factors weigh in favor
 of preliminary approval or, at a minimum, are neutral.

1 **2. The Strength of Plaintiff’s Case Weighs in Favor of**
 2 **Settlement Approval**

3 This factor requires the Court to balance the strength of the Plaintiff’s case on
 4 the merits against the amount offered in settlement. *See National Rural*
 5 *Telecommunications Cooperative v. DirecTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal.
 6 2004) [hereinafter “*NRTC*”] (citing 5 Moore Fed. Practice, § 23.85[2][b] (Matthew
 7 Bender 3d ed.)). “[A] proposed settlement is not to be judged against a speculative
 8 measure of what might have been awarded in a judgment in favor of the class.” *Id.*
 9 Thus, in *National Rural Telecommunications Cooperative*, the court reviewed the
 10 settlement agreement and considered the issues in the case, and determined that “the
 11 settlement terms compare favorably to the uncertainties associated with continued
 12 litigation regarding the contested issues” in the case. *Id.*

13 Here, the Court already dismissed the class claims and ordered Wilson to
 14 arbitrate his individual claims. That Arbitration Order is on appeal. If this
 15 settlement were not approved, and Wilson’s appeal were unsuccessful, the Class
 16 would receive no benefit whatsoever and each Class Member would be required to
 17 arbitrate his or her individual claims. In contrast, the Settlement Agreement
 18 provides immediate class-wide relief without the risks, costs, and time of individual
 19 arbitrations. The immediate and concrete benefits of the Settlement Agreement
 20 outweigh the uncertainties of obtaining no class relief at all.

21 **3. The Likely Duration of Further Litigation Weighs in Favor**
 22 **of Settlement Approval**

23 “In most situations, unless the settlement is clearly inadequate, its acceptance
 24 and approval are preferable to lengthy and expensive litigation with uncertain
 25 results.” *NRTC*, 221 F.R.D. at 526 (quoting 4 A. Conte & H. Newberg, *Newberg on*
 26 *Class Actions*, § 11:50 at 155 (4th ed. 2002)). “It has been held proper to take the
 27 bird in hand instead of a prospective flock in the bush.” *Id.* (quoting *Oppenlander v.*
 28 *Standard Oil Co. (Indiana)*, 64 F.R.D. 597, 624 (D. Colo. 1974)).

1 The parties in this lawsuit have engaged in aggressive, time-consuming, and
 2 costly pretrial litigation. Defendants have contested the merits of Wilson’s claims
 3 and his ability to pursue his class claims. Those efforts resulted in the Arbitration
 4 Order and an appeal. In the absence of a settlement there are two scenarios: (1) the
 5 Arbitration Order is affirmed, in which case the class claims are dismissed and the
 6 Class gets nothing; and (2) the Arbitration Order is reversed, and the case would be
 7 remanded to this Court for a certification hearing and potential trial on the merits,
 8 and presumably another appeal. *See NRTC*, 221 F.R.D. at 527 (“Avoiding such a
 9 trial and the subsequent appeals in this complex case strongly militates in favor of
 10 settlement rather than further protracted and uncertain litigation.”). Given these two
 11 alternatives to the Settlement Agreement, the compromise that gives immediate and
 12 concrete benefits to the Class weighs heavily in favor of approval. At a minimum,
 13 the Settlement Agreement is well within the realm of reasonableness required for
 14 preliminary approval.

15 **4. The Risk of Maintaining Class-wide Status through Trial** 16 **Weights in Favor of Settlement Approval**

17 This Court has already determined that Wilson’s claims must be arbitrated on
 18 an individual, not class-wide, basis. (Ex. D, at 2.) Although the Arbitration Order is
 19 the subject of appeal, there is a significant risk that it will be upheld and the Class
 20 will be provided no relief. Accordingly, this factor weighs so heavily in favor of
 21 approval that it alone may be sufficient. *See NRTC*, 221 F.R.D. at 525-26 (“Under
 22 certain circumstances, one factor alone may prove determinative in finding
 23 sufficient grounds for court approval.”).

24 **5. The Settlement Consideration Weighs in Favor of Settlement** 25 **Approval**

26 In evaluating the consideration obtained by the class members, “[i]t is the
 27 complete package taken as a whole, rather than the individual component parts, that
 28 must be examined for overall fairness.” *Officers for Justice*, 688 F.2d at 628. “[A]

1 proposed settlement may be acceptable even though it amounts to only a fraction of
 2 the potential recovery that might be available to the class members at trial.” *NRTC*,
 3 221 F.R.D. at 527. Here, the settlement relief weighs in favor of approval. Initially,
 4 by filing this action, Wilson argues that he brought an end to Defendants’
 5 questionable conduct, and a resumption of honoring the extended warranties at
 6 issue. By doing so, as of June 2010, Wilson brought about the cessation of the
 7 alleged ongoing harm to the Class. The Settlement Agreement provides further
 8 relief, securing an extra year of warranty coverage for all Class Members. Thus,
 9 although the settlement does not include direct monetary relief for the Class, it
 10 formally stops Defendants’ alleged unlawful practices and provides the entire Class
 11 with injunctive relief, the retail price of which is approximately \$60.00 per valid
 12 claim. The significant benefits Wilson has secured for the Class weigh in favor of
 13 preliminary approval of the Settlement Agreement.

14 **6. Plaintiff Has Sufficient Information to Determine the** 15 **Propriety of the Settlement**

16 The extent of discovery may be relevant in determining the adequacy of the
 17 parties’ knowledge of the case.” *Manual for Complex Litigation, Third*, § 30.42
 18 (1995). “A court is more likely to approve a settlement if most of the discovery is
 19 completed because it suggests that the parties arrived at a compromise based on a
 20 full understanding of the legal and factual issues surrounding the case.” 5 *Moore’s*
 21 *Federal Practice*, § 23.85[2][e] (Matthew Bender 3d ed.).

22 Prior to the Arbitration Order, the Parties engaged in extensive discovery and
 23 Defendants produced more than 200,000 documents. The most significant obstacle
 24 to class-wide relief—the contractual arbitration provision with a class-action
 25 waiver—was extensively briefed and argued to this Court and the Ninth Circuit.
 26 The Parties arrived at a compromise based on a full understanding of the legal and
 27 factual issues. Indeed, the Settlement Agreement is a quintessential compromise
 28

1 reached at a point in the litigation where, in the absence of a settlement, the Class
2 was at risk of receiving no relief whatsoever.

3 **7. The Experience and Views of Counsel Weigh in Favor of** 4 **Settlement Approval**

5 “‘Great weight’ is accorded to the recommendation of counsel, who are most
6 closely acquainted with the facts of the underlying litigation.” *NRTC*, 221 F.R.D. at
7 528 (internal quotations and citations omitted); *see also Cotton v. Hinton*, 559 F.2d
8 1326, 1330 (5th Cir. 1977) (“the trial court is entitled to rely upon the judgment of
9 experienced counsel for the parties”). The basis for this reliance is that “[p]arties
10 represented by competent counsel are better positioned than courts to produce a
11 settlement that fairly reflects each party’s expected outcome in the litigation.” *In re*
12 *Pacific Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Indeed, when
13 evaluating a proposed settlement, the Court, “absent fraud, collusion, or the like,
14 should be hesitant to substitute its own judgment for that of counsel.” *Cotton*, 559
15 F.2d at 1330.

16 Here, Class Counsel have extensive experience in prosecuting and settling
17 class actions, including consumer class actions. (Crowther Decl., ¶¶ 6 & 10, Exs. A
18 & B.) Class Counsel agree that the Settlement Agreement represents a strong result
19 for the Class, especially given the Arbitration Order and the significant risk that in
20 the absence of a settlement agreement each class member would be forced to pursue
21 his or her individual claims in arbitration. (*Id.*, ¶ 18.) Preliminary approval of a
22 settlement and notice of the settlement to the proposed class is appropriate.

23 **V. PROCEDURAL ISSUES FOR THE RULE 23(B)(2) CLASS**

24 **A. The Proposed Notice Is Reasonable**

25 “‘When a class is certified under Rule 23(b)(2) and only provides for
26 injunctive relief, no notice of class certification is required.” *Grant*, 2013 WL
27 6499698, at *6; *see also Wal-Mart Stores, Inc.*, 131 S.Ct. at 2559 (Rule 23(b)(2)
28 “does not require that class members be given notice and opt-out rights”). Rather,

1 when certifying a class under Rule 23(b)(2), “the court may direct appropriate notice
2 to the class.” Fed. R. Civ. P. 23(c)(2)(A). As the rule indicates, whether to direct
3 notice under Rule 23(c)(2)(A) is a decision within the court’s discretion. *See id.*

4 Nonetheless, “[a]s part of the court’s process in reviewing the proposed
5 settlement, Rule 23(e) states that “[t]he court *must* direct notice in a reasonable
6 manner to all class members *who would be bound by the proposal.*” William B.
7 Rubenstein, *Newberg on Class Actions*, § 8:14 (Dec. 2013). Notice under Rule
8 23(e) is not the same as Rule 23(c)(2)(A) notice. Thus, while “[a]dequate notice is
9 critical to court approval of a class settlement under Rule 23(e),” *Hanlon*, 150 F.3d
10 at 1025, there is no statutory or due process requirement that extraordinary efforts be
11 made to ensure that all Class Members receive actual notice of the settlement.
12 Indeed, the Court has significant latitude to determine the type and extent of notice
13 that would be reasonable for the settlement of a claim. *See* 7B Wright, Miller &
14 Kane, *Fed. Prac. & Proc.: Civil 3D*, § 1797.6 (“The court has complete discretion in
15 determining what constitutes a reasonable notice scheme, both in terms of how
16 notice is given and what it contains.”).

17 The specifics of the notice are dictated by two requirements: (1) “that the
18 court hold a fairness hearing on the proposed settlement,” and (2) “the guarantee
19 that class members have the right to object to the settlement.” *Newberg on Class*
20 *Actions*, § 8:16. Here, the Settlement Agreement and proposed notice to the Class
21 (the “Notice”) provide for the administration of the settlement, the content of the
22 Notice, and the dissemination of the Notice (collectively, the “Notice Plan”). The
23 Notice Plan is calculated to ensure that Class Members have reasonable notice of the
24 fairness hearing and a right to object to the settlement, opt out of the Class, or enjoy
25 the benefits of the Settlement Agreement.

26 **1. Settlement Administration and Content of the Class Notice**

27 The Settlement Agreement calls for the appointment of NEW as the
28 Settlement Administrator (subject to Court approval). (Settlement Agreement, ¶

7.1.) In this role, NEW assumes responsibility for performing (or for retaining and supervising Rust Consulting, Inc. (“Rust”) in performing) and paying for all costs associated with: (a) arranging for and overseeing publication of the Class Notice through internet banner advertisements; (b) creating and maintaining a settlement website (the “Settlement Website”); (c) creating and maintaining a toll-free number (the “Toll-Free Number”) through which information about the Settlement Agreement can be obtained; (d) receiving requests for exclusion, or opt-outs, from the Class and compiling records relating to those requests; and (e) receiving and compiling objections to the Settlement Agreement. (Settlement Agreement, ¶ 7.1.)

“Notice is satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.” *Churchill Village LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (quotations omitted). The Parties negotiated the form of the Notice, which provides a definition of the Class, highlights the terms of the settlement, and provides instructions for requesting exclusion from the Class and objecting to the Settlement Agreement. (Settlement Agreement, Ex. 1.) The Notice also sets forth the date, time and place of the final approval hearing, along with the deadlines and procedures for requesting exclusion for the Class and objecting to the Settlement Agreement, and includes the addresses of the Court, Plaintiff’s counsel, and the settlement administrator. (*Id.*)

In total, the Notice provides more than enough information to provide Class Members the right to object to the Settlement Agreement, and, although not required, the Notice provides opt-out rights.

2. Dissemination of the Notice

The Notice Plan is targeted at reaching the 1.7 million consumers who purchased the Pro-ESPs. However, for the most part, Defendants did not sell computers directly to consumers and the sales occurred at least six years ago. Accordingly, it would be cost prohibitive to attempt to track down current contact

1 information for individual Class Members. Where, as here, “a national class . . .
 2 consists of persons with unknown addresses, notice by publication is reasonable.”
 3 *Weeks v. Kellogg Co.*, CV 09-08102 (MMM)(RZx), 2013 WL 6531177, at *11
 4 (C.D. Cal. 2013).

5 In *Weeks*, for example, Judge Morrow approved notice by online publication
 6 to a class of consumers who bought Kellogg’s Rice Krispies and Cocoa Krispies:

7 [1] notice was published in online versions of newspapers,
 8 websites sponsored by television stations, parenting
 9 websites, and 782 parenting and consumer affairs blogs;
 10 [2] by the creation of a website specifically addressing the
 11 settlement; and [3] by the establishment of a toll-free
 12 number that 120 class members had called as of July 15,
 13 2011 to obtain information regarding the settlement.

14 *Id.*, at *1, *11.

15 Here, the Notice Plan in the Settlement Agreement applies a similar three-
 16 pronged approach to target consumers who own a Gateway computer, because
 17 common sense dictates that the easiest way to find unknown individuals who own a
 18 computer is via a computer (*i.e.*, through online advertisements). *See* Fed. R. Civ. P.
 19 23(e)(1) (notice of settlement must be in a “reasonable manner”).

20 First, as in *Weeks*, notice will be published on a vast array of online media
 21 and publications. In particular, ads on the social networking site *Facebook.com* will
 22 yield an estimated 14,150,943 impressions. Ads on *24/7 Real Media* will reach a
 23 network that represents more than 5,000 websites across a variety of interests. The
 24 advertisements will yield an estimated 14,140,943 impressions. Ads on *Specific*
 25 *Media* will reach a portfolio of websites that include sites in the genres of arts &
 26 entertainment, automotive, business, personal finance, careers & jobs, community,
 27 family & parenting, food & drink, health, home & garden, news & media, pets,
 28 politics, portals, real estate, reference, research & education, shopping, sports &

1 recreation, technology, toys & games, travel & tourism, and weather. The *Specific*
 2 *Media* ads will yield an estimated 5,665,722 impressions. In total, in excess of
 3 61,000,000 impressions are expected from the online advertisements alone.
 4 (Settlement Agreement, ¶ 7.2(b).) These online advertisements will take the form of
 5 “banners,” that when clicked will take the consumer to the Settlement Website.
 6 (Settlement Agreement, Ex. 2.); *cf. Weeks*, 2013 WL 6531177, *4 (approving
 7 banner ads that redirect consumers to a settlement website).

8 Second, as in *Weeks*, NEW shall retain and pay Rust Consulting, Inc. (“Rust”)
 9 to set up and maintain a Settlement Website. The Settlement Website will allow
 10 visitors to access and print a complete copy of the Class Notice, the Settlement
 11 Agreement, a Q&A Form, and to determine whether they are class members.
 12 (Settlement Agreement, ¶ 7.2(b).) The Settlement Website will be accessible
 13 through the aforementioned banner advertisements, as well as through routine
 14 Internet searches like those at google.com and yahoo.com.

15 Third, also as in *Weeks*, NEW, working with Rust, will set up and maintain
 16 the Toll-Free Number, which shall allow callers to request copies of the Class
 17 Notice and the Settlement Agreement and to determine whether they are members of
 18 the Class. (Settlement Agreement, ¶ 7.2(c).)

19 Finally, Class Members also can obtain full relief by calling the toll-free
 20 number in their warranty, which was reactivated as a result of this litigation almost
 21 four years ago in 2010. (*See* Section II.E, *supra*.)

22 This multi-pronged Notice Plan satisfies the reasonableness requirements of
 23 Rule 23(e).

24 ***B. The Appointment of the Class Representative and Class Counsel***

25 The Settlement Agreement calls for the preliminary approval of Wilson as the
 26 class representative for settlement purposes only. (Settlement Agreement, ¶ 5.1(d).)
 27 It also calls for the preliminary approval of Denlea & Carton LLP and Caldwell
 28 Leslie & Proctor, PC as “Class Counsel.” (*Id.*, § 5.1(c).)

1 First, Wilson should be preliminarily approved as the class representative. He
 2 has diligently pursued his rights against Defendants since 2008 and, as explained
 3 above, his claims are typical of the Class that he seeks to represent: each Class
 4 Member purchased a Pro-ESP warranty that was unexpired as of December 1, 2008
 5 and was allegedly denied the benefit of his or her bargain.

6 Second, “a court that certifies a class must appoint class counsel.” Fed. R.
 7 Civ. P. 23(g)(1). When an applicant seeks appointment as class counsel, the court
 8 may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and
 9 (4). *See* Fed. R. Civ. P. 23(g)(2). Under Rule 23(g)(1), the Court “must consider:
 10 (i) the work counsel has done in identifying or investigating potential claims in the
 11 action; (ii) counsel’s experience in handling class actions, other complex litigation,
 12 and the types of claims asserted in the action; (iii) counsel’s knowledge of the
 13 applicable law; and (iv) the resources that counsel will commit to representing the
 14 class.” Fed. R. Civ. P. 23(g)(1). Under Rule 23(g)(4), class counsel must fairly and
 15 adequately represent the interests of the class.

16 Here, the proposed Class Counsel have diligently prosecuted this action for
 17 almost five years. They have investigated the facts and the applicable law, and
 18 invested thousands of hours and a significant amount of their own financial
 19 resources in pursuing this action. Moreover, proposed Class Counsel have
 20 experience in commercial class-action litigation and have fairly and adequately
 21 represented the interests of the Class. Indeed, in the absence of the diligence of
 22 Class Counsel, the Class would be obtaining no relief whatsoever.

23 ***C. Proposed Schedule of Events***

24 In connection with preliminary approval of the settlement, the Court must set
 25 a final approval hearing date, as well as dates for providing Notice to the Class, and
 26 setting deadlines for objecting to or in support of the Settlement Agreement. Under
 27 the Class Action Fairness Act, notice of the settlement also must be provided to
 28 certain state and federal officials no later than ten business days following the filing

1 of this motion for preliminary approval. 28 U.S.C. § 1715. Additionally, the final
 2 approving hearing may not be set until at least 90 days after Defendants provide the
 3 notification to federal and state officials. *See id.*

4 In addition, Rule 23(h)(1) requires that “[n]otice of the motion [for attorneys’
 5 fees] must be served on all parties and, for motions by class counsel, directed to
 6 class members in a reasonable manner.” Fed. R. Civ. P. 23(h)(1). Here the Notice
 7 and Settlement Agreement satisfy the requirements of Rule 23(h)(1), as they notify
 8 the Class Members that Plaintiff’s counsel will apply to the Court for attorneys’ fees
 9 on the same date as the fairness hearing. The details of the agreement regarding
 10 attorneys’ fees are available at the Settlement Website, which is accessible through
 11 the banner advertisements, the Toll-Free Number and the Internet.

12 Based on the foregoing and the agreement of the Parties, Wilson proposes the
 13 schedule attached hereto as Appendix A, which contemplates a hearing for final
 14 approval on August 25, 2014.

15 **VI. CONCLUSION**

16 For all the foregoing reasons, Plaintiff Peter Wilson requests that the Court
 17 grant his motion to conditionally certify the class, preliminarily approve the
 18 Settlement Agreement, and endorse the schedule attached at Appendix A.

19
 20 DATED: May 12, 2014

Respectfully submitted,

21 CALDWELL LESLIE & PROCTOR, PC
 22 ROBYN C. CROWTHER
 23 JEANNE A. FUGATE
 24 MATTHEW O’BRIEN

25 By /S/ Robyn C. Crowther

26 ROBYN C. CROWTHER

27 Attorneys for Plaintiff and others similarly
 28 situated

APPENDIX A

Motion for preliminary approval to be filed	May 12, 2014
Opposition (if any) to Wilson's motion for preliminary approval	May 19, 2014
Deadline for serving CAFA notice to state and federal authorities. 28 U.S.C. § 1715.	May 22, 2014
Reply (if any) in support of motion for preliminary approval	May 26, 2014
Hearing on motion for preliminary approval	June 9, 2014 (8:30 a.m.)
Motion for attorney's fees and costs to be filed.	July 7, 2014
Publication of Class Notice	30 days after the entry of the Preliminary Approval Order
Deadline for requesting exclusion from the Class	Requests must be postmarked no later than thirty (30) days following the publication of the Class Notice
Deadline for Objecting to the Settlement Agreement	Objections must be postmarked no later than thirty (30) days following the publication of the Class Notice
Opposition (if any) to motion for attorney's fees and costs	July 21, 2014
Reply (if any) to motion for attorney's fees and costs	July 28, 2014
Deadline for filing initial papers in support of final approval the Settlement Agreement	July 28, 2014

1 Deadline for filing opposition August 4, 2014
2 (if any) to motion for final
3 approval the Settlement
4 Agreement

4 Deadline for Class Members to August 4, 2014
5 file and serve notice of
6 appearance at the fairness
7 hearing

7 Deadline for filing reply papers August 7, 2014
8 (if any) in support of motion for
9 final approval the Settlement
10 Agreement

10 Fairness Hearing (motions for August 25, 2014 (8:30 a.m.)
11 final approval and attorney's
12 fees and costs)